Supreme Court, U.S.
FILED
JUN 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDWIN W. EDWARDS, in his Official Capacity as Governor of the State of Louisiana, *et al.*,
Appellants,

v.

DON AGUILLARD, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS AS AMICI CURIAE SUPPORTING APPELLANTS

Of Counsel:
FOREST D. MONTGOMERY
NATIONAL ASSOCIATION OF EVANGELICALS
1430 K Street, N.W.
Washington, D.C. 20005
(202) 628-7911

MICHAEL J. WOODRUFF
Counsel of Record
KIMBERLEE W. COLBY
SAMUEL E. ERICSSON
CHRISTIAN LEGAL SOCIETY
P.O. Box 1492
Merrifield, VA 22116
(703) 560-7314

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a statute is permitted under the First Amendment to require alternative scientific models to be utilized for balanced treatment in teaching about origins in the public school curriculum when:

(1) Instruction about origins is not required in science, humanities or other educational programs, but is permitted if alternative scientific models of origins are taught as theories derived from scientific evidences; and

(2) The exclusion of evolution-science is prohibited when scientific evidences for creation-science are taught, just as the inclusion of scientific data supporting creation-science is required where evolution-science is taught.

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE APPELLATE COURT DECISION SHOULD BE REVERSED ON PROCEDURAL GROUNDS SINCE IT CONTRAVENED THE RULES FOR SUMMARY JUDGMENT	3
II. THERE IS A DEBATE IN THE SCIENTIFIC COMMUNITY OVER THE LIMITS AND DEFINITIONS OF SCIENCE, INCLUDING EVOLUTIONARY THEORY AND CREATION-SCIENCE. THE COURT BELOW MISTAKENLY TREATED THE LOUISIANA STATUTE WITHOUT REFERENCE TO THAT IMPORTANT CONTEXT	4
III. THE STATUTE IS CONSISTENT WITH AN UNDERLYING PURPOSE OF THE FIRST AMENDMENT, WHICH IS TO PROMOTE THE FREE EXCHANGE OF INFORMATION AND IDEAS	10
IV. THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE THAT FACTUAL INFORMATION BE SUPPRESSED	13
A. The Secular Purpose	13
B. The Primary Effect	19
C. Excessive Entanglement	20
CONCLUSION	22

TABLE OF AUTHORITIES

CASES: Page

Abrams v. United States, 250 U.S. 616 (1919).... 11
Aguilar v. Felton, No. 84-237 (July 1, 1985) 21
Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985) 7, 16, 18
Aguillard v. Edwards, 778 F.2d 225 (5th Cir. 1985) 14, 18, 19
Aguillard v. Treen, No. 81-4787, slip op. (E.D. La.) 20
Board of Education v. Allen, 392 U.S. 236 (1968).. 21
Board of Education, Island Trees v. Pico, 457 U.S. 765 (1978) 10, 11, 12
Buckley v. Valeo, 424 U.S. 1 (1976) 13, 18, 19
Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975)..... 8
Epperson v. Arkansas, 393 U.S. 97 (1968)..... 4, 13
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)..... 10, 11
Griswold v. Connecticut, 381 U.S. 479 (1965)..... 11
Grove v. Mead School District No. 354, 753 F.2d 1528 (9th Cir.), *cert. denied*, 106 S.Ct. 85 (1985) 12
Keyishian v. Board of Regents, 385 U.S. 589 (1967) 11
Kleindienst v. Mandel, 408 U.S. 753 (1972)..... 10
Lamont v. Postmaster General, 381 U.S. 301 (1965) 10
Lemon v. Kurtzman, 403 U.S. 602 (1971) 13, 14, 21
Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977) 10, 18
Martin v. Struthers, 319 U.S. 141 (1943) 10
McDaniel v. Paty, 435 U.S. 618 (1978) 16
McGowan v. Maryland, 366 U.S. 420 (1961)..... 17
Perry Education Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983) 13
Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969) 12
Saxbe v. Washington Post Co., 417 U.S. 843 (1974) 10
Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927) 13

TABLE OF AUTHORITIES—Continued

	Page
School District of Abingdon Township v. Schempp, 374 U.S. 203 (1963)	17, 21
Stanley v. Georgia, 394 U.S. 557 (1969)	10
Steele v. Waters, 527 S.W.2d 72 (Tenn. 1975)	8
Stone v. Graham, 449 U.S. 39 (1980)	17
Thornhill v. Alabama, 310 U.S. 88 (1940)	10, 11
Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969)	11, 12, 13
United States v. Ballard, 322 U.S. 78 (1944)	11
Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)	10, 11
Wallace v. Jaffree, 105 S.Ct. 2479 (1985)	14, 17, 18
Whitney v. California, 274 U.S. 357 (1927)	11
Wolman v. Walter, 433 U.S. 229 (1977)	21
STATUTES:	
La. Rev. Stat. §§ 17:286.1-286.7	3, 4
La. Rev. tSat. § 17:286.2	15
La. Rev. Stat. § 17:286.3(1)	15
La. Rev. Stat. § 17:286.4C	15
OTHER AUTHORITIES:	
Address by C. Patterson, American Museum of Natural History, New York City (Nov. 5, 1981) (unpublished transcript)	5
F. Aicken, *The Nature of Science* (1984)	7
Brady, "Dogma and Doubt", *Biological Journal of the Linnean Society* 79 (1982)	7
B. Cohen, *The Birth of a New Physics* (rev. 1985)	9
Cotes, *Preface* to 3 I. Newton, *Newton's Mathematical Principles* (2d ed. 1713) (F. Cajori trans. 2d ed. 1946)	7
R. Crease and C. Mann, *The Second Creation: Makers of the Revolution in 20th Century Physics* (1986)	6
P. Davies, *Superforce: The Search for a Grand Unified Theory of Nature* (1984)	6
P. Davies, *God and the New Physics* (1983)	6

TABLE OF AUTHORITIES—Continued

Page

M. Denton, *Evolution: A Theory in Crisis* (1968) .. 4, 5, 6, 7, 8

P. Grassé, *Evolution of Living Organisms: Evidence for a New Theory of Transformation* (1977) 5

F. Hoyle, *The Intelligent Universe: A New View of Creation and Evolution* (1983) 7

R. Hooykaas, *Religion and the Rise of Modern Science* (1972) 9

F. Hoyle and C. Wickramasinghe, *Evolution From Space: A Theory of Cosmic Creationism* (1981) .. 7

R. Jastrow, *God and the Astronomers* (1978) 5, 6, 9

R. Jastrow, *Until the Sun Dies* (1977) 4, 6, 10

T. Kuhn, *The Structure of Scientific Revolutions* (2d ed. 1970) 7, 8

M. Midgley, *Evolution As A Religion: Strange Hopes and Stranger Fears* (1985) 5

D. Papineau, *Theory and Meaning* (1979) 7

G. Rattray Taylor, *The Great Evolution Mystery* (1983) 6, 7

Ruse, *The Ideology of Darwinism,* in *Darwin Today* (1983) 5

R. Shapiro, *Origins: A Skeptic's Guide to the Creation of Life on Earth* (1986) 6, 7

C. Thaxton, W. Bradley and R. Olsen, *The Mystery of Life's Origin: Reassessing Current Theories* (1984) 6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1513

EDWIN W. EDWARDS, in his Official Capacity as Governor of the State of Louisiana, *et al.*,
Appellants,

v.

DON AGUILLARD, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS AS AMICI CURIAE SUPPORTING APPELLANTS

INTEREST OF THE AMICI CURIAE

The Christian Legal Society (CLS) is a non-profit Christian professional association, founded in 1961, with a present membership of 3,500 judges, attorneys, law professors, and law students. Concerned about Constitutional rights, it founded the Center for Law and Religious Freedom in 1975 to protect and promote the freedoms guaranteed by the First Amendment through advocacy and education. The Center has been active in public edu-

cation law issues, including released time, curriculum and values, and freedom of speech.

While CLS members hold diverse views about the various theories of the origins of the universe, they favor the presentation of all scientific evidence in the public school classroom regardless of whether such evidence seems to support or oppose a religious belief. This is the crux of the instant case.

The National Association of Evangelicals, located in Wheaton, Illinois, is a non-profit association of evangelical Christian organizations, colleges, and universities, as well as some 44,000 churches from 74 denominations. It serves a constituency of 10 to 15 million people.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2

SUMMARY OF ARGUMENT

Both the Appellate Court and the trial court mischaracterized creation-science as non-scientific without regard for current developments in science. The court erred in granting a motion for summary judgment against appellants by failing to take as true uncontroverted evidentiary facts submitted by appellants.

While it is unnecessary to reach the merits of the statute, it is apparent that the Louisiana statute avoids Constitutional infirmity by mandating a facially neutral and inclusive treatment of two scientific models in the treatment of origins in public school instruction. It thus advances a vital interest of the freedom of speech, namely, to promote the dissemination of ideas. Therefore, judgment should be reversed and the matter remanded for trial.

ARGUMENT

I. THE APPELLATE COURT DECISION SHOULD BE REVERSED ON PROCEDURAL GROUNDS SINCE IT CONTRAVENED THE RULES FOR SUMMARY JUDGMENT.

Amici urge that the judgment of the Fifth Circuit be reversed, that judgment in favor of the appellants be entered or, in the alternative, the case remanded to the district court for trial. The appellate court's panel opinion, 765 F.2d 1251 (5th Cir. 1985), assumed that La. Rev. Stat. §§ 17.286.1 - 286.7 (hereinafter "the Act") was deficient and disserved academic freedom because the Act required the teaching of the creation theory only if the theory of evolution is taught. It ignored the point that the converse is also true. The Act mandates the teaching of evolution-science if creation-science was taught.

Further, the appellate court missed the point that maximum discretion was left to the teacher as to how these subjects were to be treated in order to give a balanced treatment to the scientific evidences supporting either model. Finally, ignoring the evidence provided by appellants concerning the definition, nature and characteristics of both scientific models, the court below said, "The Act's intended effect is to discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism, a religious belief." *Id.* at 1257. The court below would be correct if after a trial concerning the nature of creation-science and evolution-science, it determined (1) that the two models treated in the statute were not alternative scientific theories; or (2) that there was no serious normal scientific research apart from an evolution-science model; or (3) that some evolutionary theory was not being challenged by leading scientists as non-science. However, since the record is clear that uncontroverted evidence was presented to the contrary, there were material, triable issues of fact. Judg-

ment should be reversed and judgment entered in favor of appellants, or, in the alternative, the case remanded to the district court for trial.

II. THERE IS A DEBATE IN THE SCIENTIFIC COMMUNITY OVER THE LIMITS AND DEFINITIONS OF SCIENCE, INCLUDING EVOLUTIONARY THEORY AND CREATION-SCIENCE. THE COURT BELOW MISTAKENLY TREATED THE LOUISIANA STATUTE WITHOUT REFERENCE TO THAT IMPORTANT CONTEXT.

> "What is the ultimate solution to the origin of the Universe? The answers provided by the astronomers are disconcerting and remarkable. Most remarkable of all is the fact that in science, as in the Bible, the world begins with an act of creation."
>
> —Astronomer Robert Jastrow, in *Until the Sun Dies* (1977)

This case is not about the teaching of religious dogma in science classes under the guise of science.[1] This case is not about protecting a science teacher's right to teach as fact now discredited macroevolutionary dogma, such as the universe was created out of nothing by chance; that humans evolved from inorganic life, or that random selection can account for all major transformations in life forms.[2] This case is about the arbitrary

---

[1] This case is distinguished from *Epperson v. Arkansas*, 393 U.S. 97 (1968), in that the language of La. Rev. Stat. §§ 17:286.1-286.7 permits the teaching of origins, but requires both creation-science and evolution-science models as "scientific theory" to be utilized, considering scientific evidences for each model, thereby providing an appropriate limitation to avoid subjects beyond the range of normal scientific inquiry, such as religious dogma. Furthermore, the Act is neutrally "inclusive", allowing the teaching of both evolution-science and creation-science as scientific models, and not "exclusive", preferring one over the other.

[2] *See* M. Denton, *Evolution: A Theory in Crisis* (1986), a scientific critique of the current Darwinian model from paleontology to molecular biology. The bankruptcy of evolution as a general theory

judicial exclusion of scientific evidence about origins from public school instruction as provided by a state statute. Noted astronomer, an agnostic in matters of religion,[3] founder of NASA's Goddard Institute for Space Studies, Professor Robert Jastrow refers to such evidence when he writes, "Now we see how the astronomical evidence leads to a biblical view of the origin of the world." [4]

The subject of public school instruction about origins is controversial. Evolutionists exhibit an intense commitment to their "beliefs to protect against any challenge to the Darwinian postulate of "uniformity of natural causes in a closed system" now under serious scientific attack.[5] For example, one scientist has recently said,

---

requires exotic meta-scientific explanations from leading authorities to recurring questions, such as "hopeful monsters", "miracle", "almost miracle" and "panspermia" (seeding life on earth from space). *Id.* at 227-230, 249-271. Denton says, "Nothing illustrates more clearly just how intractable a problem the origin of life has become than the fact that world authorities can seriously toy with the idea of panspermia." *Id.* at 271. *See also* French evolutionist P. Grassé, who says, ". . . [Evolution's] problems are very far beyond the means of present-day science." P. Grassé, *Evolution of Living Organisms: Evidence for a New Theory of Transformation* 243 (1977).

[3] R. Jastrow, *God and the Astronomers* 11 (1978).

[4] *Id.* at 14.

[5] *See* philosopher of biology M. Midgley, *Evolution As A Religion: Strange Hopes and Stranger Fears* (1985) ("Evolution . . . is the creation myth of our time." *Id.* at 30.); M. Denton, *supra* note 2 at 93-118, 345-359; M. Ruse points out the ideological element in evolutionary theory. Ruse, "The Ideology of Darwinism," in Geissler and Scheler, *Darwin Today*, 246 (1983). *See also* British paleontologist C. Patterson, "Evolutionism and Creationism," Address at the American Museum of Natural History, New York City, November 5, 1981. Among his remarks was the following: "Can you tell me anything you know about evolution, any one thing, any one thing that is true? I tried that question on the geology staff at the Field Museum of Natural History and the only answer I got was silence. I tried it on the members of the Evolutionary Morphology Seminar in the University of Chicago, a very prestigious body of

> "Ultimately the Darwinian theory of evolution is no more nor less than the great cosmogenic myth of the twentieth century. Like the Genesis based cosmology which it replaced, and like the creation myths of ancient man, it satisfies the same deep psychological need for an all embracing explanation for the origin of the world. . . ." Michael Denton, in *Evolution: A Theory in Crisis* 358 (1986)

Just so, there are fundamentalists who still think Darwinian theory poses a threat to their beliefs. To focus on the concerns of either is a red herring. This case is not about evolution as religion or religion as science. The challenged Louisiana statute was intended, in the interest of academic freedom, to present the scientific evidences for two theories of evolution-science and creation-science.

This case is about whether a court may determine and then impose as a matter of law a definition of science contrary to that provided by state statute without a trial to determine material issues of fact. That a court could so rule ignores the developments and extraordinary complexity of modern science and the scientific theories about origins.[6] Indeed, the panel opinion states that an idea

---

evolutionists and all I got there was silence for a long time and eventually one person said 'I do know one thing—it ought not to be taught in high school.' . . . We know it ought not to be taught in high school and that's all we know about it. . . . So I think many people in this room would acknowledge that during the last few years if you had thought about it at all, *you've experienced a shift from evolution as knowledge to evolution as faith.* I know that's true of me and I think it's true of a good many of you in here . . . ." (emphasis added).

[6] *See* R. Jastrow, *God and the Astronomers* (1978); R. Jastrow, *Until the Sun Dies* (1977); G. Rattray Taylor, *The Great Evolution Mystery* (1983); C. Thaxton, W. Bradley and R. Olsen, *The Mystery of Life's Origin: Reassessing Current Theories* (1984); P. Davies, *Superforce: The Search for a Grand Unified Theory of Nature* (1984); P. Davies, *God and the New Physics* (1983); R. Crease

which has its religious counterpart, presumably such as the one offered by Professor Jastrow above, is inadmissible "irrespective of whether it is fully supported by scientific evidence." [7] Thus, in the view of the court below, scientific evidences cannot be taught if such are merely consistent with religious belief!

There is no unanimity within the scientific community about the definitions of science, evolution-science and creation-science.[8] What is clear is that old assumptions are breaking up and that evolutionary theory is as much at risk as an outmoded paradigm as some believe creation-science to be; erroneously thinking that the creation-science of 1950 is the same as it is today.[9] Evolutionists are not in agreement about the place of evidence of intelligent design or non-chance concepts within their theory.

---

and C. Mann, *The Second Creation: Makers of the Revolution in 20th Century Physics* (1986); R. Shapiro, *Origins: A Skeptic's Guide to the Creation of Life on Earth* (1986); F. Hoyle, *The Intelligent Universe: A New View of Creation and Evolution* (1983); and F. Hoyle and C. Wickramasinghe, *Evolution From Space: A Theory of Cosmic Creationism* (1981).

[7] *Aguillard v. Edwards*, 765 F.2d 1251, 1253 (1985).

[8] For divergent views on science and its methodologies, *see* T. Kuhn, *The Structure of Scientific Revolutions* 2d Ed., enlarged (1962, 1970); D. Papineau, *Theory and Meaning* (1979); F. Aicken, *The Nature of Science* (1984). For varied views on evolution, *see* M. Denton, *supra* note 2, and G. Rattray Taylor, *supra*, note 6. Taylor recognizes that "creationists are of several kinds". *Id.* at 2. Thaxton, *et al.*, illustrate scholarly scientific research critical of the evolutionary model, *supra* note 6. On the integration of experimental science and belief in the purposeful order and objectivity of the natural world created by the Creator, *see* R. Cotes, *Preface* to the Second Edition, *Newton's Mathematical Principles* in 1713 and I. Newton's *General Scholium*, third book, both in F. Cajori, trans., *Newton's Mathematical Principles* (1946).

[9] *See* Denton, *supra* note 2; and R.H. Brady, "Dogma and Doubt", *Biological Journal of the Linnean Society* 79 (1982).

Creation-scientists are not in agreement about the place of evolution within their theory. Nevertheless, both theories can be taught as scientific theory resting on scientific evidence without violating the Establishment Clause.[10]

If evolution by pure chance can be taught without indoctrination into a "faith" in a materialistic and reductionist universe, then scientific evidences for intelligent design can be taught without propagating religious faith. If serious, credible scientists are engaged in such tasks, then the Louisiana legislature acted properly. It was then well within its province to encourage by an inclusive and neutral methodology the consideration of such scientific evidences. Scientists of one school may predictably neglect data because it doesn't fit their theory and consider their theoretical opponents, non-scientific.[11] Hostility to a theory of relativity or the origin of the moon or any number of "radical" ideas does not mean that they will not later be widely accepted.

The Louisiana statute achieves a laudable balance. It allows the teaching of both models as scientific and theoretical, basing understanding on scientific evidences. It protects the inclusion of evolution-science. It does implicitly recognize that the term "creation" (like the term "light") does not belong to religion alone. In this, the legislature has acted consistently with scientific terminology employed for modern scientific understandings of the universe and its origin. The word "creation" belongs as

---

[10] The use of the terms "creation", "light", "heavens", "void", "chaos", are recurring in non-theistic scientific literature. *See supra* note 6. For the discussion of evidences for the "puzzle of perfection", *see* Denton, *supra* note 2, at 326. *See also Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975). *Steele v. Waters*, 527 S.W.2d 72 (Tenn. 1975). *See also Ore. Attorney Gen. Op.*, Mem. No. 32, 1980-81, Dec. 17, 1980; 58 *Calif. Attorney Gen. Op.* 263 (1975).

[11] *See* T. Kuhn, *supra* at 18-19, 144-159.

much to science as it does to religion. The science of Kepler and Newton was not predicated upon the "uniformity of natural causes in a closed system." [12] If the scientific model allows for an open system, then the quest for evidences of intelligent design is isomorphic to the methodology of anthropology. The supposition of a grand design, a great plan, an ordered universe, an intelligent purpose, a rationality behind the order and laws of nature was assumed by Albert Einstein and earlier generations of eminent scientists.[13]

The statute has the secular effect of allowing an alternative scientific methodology, a non-evolutionary theory in science, provided it treats with scientific evidences. This does not require a religious premise.[14] This allows for the consideration of evidentiary data, by the application of scientific method. Excluding such evidence (that could otherwise be ignored if the evolutionary model taught was limited to evidences favoring a neo-Darwinian synthesis) would be to substitute ideology for science. Instead of limiting instruction to one scientific paradigm, an alternative is posed, thus exposing the premises and promises of each to rational scientific inquiry: setting forth an hypothesis; investigating by experimentation or calculation to verify or falsify the claim; then analyzing the methodology employed and the results obtained. Serious science is being done using words like "creation", and even "miracle", to explain how science is up against a limit in explaining a scientific phenomenon under dis-

---

[12] *See* R. Hooykaas, *Religion and the Rise of Modern Science* 19 and 35, (1972) (Creative scientific inquiry proceeded from their view of a reasonable God creating by design or mathematical principles); B. Cohen, *The Birth of a New Physics*, revised and updated, 184, 238-239 (1985) (on Newton's creative scientific reasoning).

[13] *See* Jastrow, *God and the Astronomers* 28 (1978); and note 12.

[14] *Compare* authorities *supra* note 6.

cussion.[15] The state legislature's right to provide that public school students may consider such scientific evidences should outweigh any speculative concern of the statute's misuse. The statute has not been implemented due to the preemptory and arbitrary judicial rejection of the appellants' right to a trial on these issues.

III. THE STATUTE IS CONSISTENT WITH AN UNDERLYING PURPOSE OF THE FIRST AMENDMENT, WHICH IS TO PROMOTE THE FREE EXCHANGE OF INFORMATION AND IDEAS.

A fundamental purpose of the First Amendment is to protect and promote the exchange of ideas among persons. "[P]ublic access to discussion, debate, and the dissemination of information and ideas" is a core value of the First Amendment. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Board of Education, Island Trees v. Pico*, 457 U.S. 853, 866 (1982) (plurality opinion). Society has a strong interest in enhancing the free flow of information. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-65 (1976); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 95-96 (1977). The discussion and dissemination of information among individuals are vital to the maintenance of a free, self-governing society. *See Bellotti*, 435 U.S. at 777; *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863-64 (1974) (Powell, J., dissenting); *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940).

The First Amendment also protects the right of the individual citizen to receive information for use in decision-making and personal development. *Pico*, 457 U.S. at 866-67 (plurality opinion), *citing*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Martin v. Struthers*, 319 U.S. 141, 143 (1943); *Lamont v. Postmaster General*, 381

---

[15] R. Jastrow, *Until the Sun Dies* 58 (1977) uses the term "miracle" as a chapter heading.

U.S. 301, 308 (1965) (Brennan, J., concurring). *See Virginia Board of Pharmacy*, 425 U.S. at 756-57. If an individual is deprived of information, his or her self-expression and search for truth may be irreparably harmed. Governmental action that limits its citizens' exposure to ideas is constitutionally suspect, since "[t]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Pico*, 457 U.S. at 866 (plurality opinion), *quoting*, *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). *See Bellotti*, 435 U.S. at 783 (First Amendment prohibits the government "from limiting the stock of information from which members of the public may draw").

The underlying assumption of the First Amendment is that, if the discussion and dissemination of ideas are protected, true ideas and information will eventually prevail over incorrect and false ideas in the marketplace of ideas. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Thus, the First Amendment rejects out of hand the notion that ideas, even false ones, are to be quashed out of fear of their acceptance, but instead insists that free and open debate on any and all ideas be allowed. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Correct ideas will eventually prevail on their own merits without the substantive danger of government "thinking for" its citizens, while false ideas eventually will die in the confrontation with truth. *See, e.g., United States v. Ballard*, 322 U.S. 78, 87 (1944); *Virginia Board of Pharmacy*, 425 U.S. at 768-70; *Thornhill*, 310 U.S. at 95.

These First Amendment values carry over into the school environment. *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). The plurality opinion in *Board of Education v. Pico* stressed the right of public school students to receive information and ideas: "[J]ust as access to ideas makes it possible for citizens

generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Pico*, 457 U.S. at 868 (plurality opinion). *See Tinker*, 393 U.S. at 511.

Unlike the factual situation in *Pico* in which school authorities sought to restrict access of students to certain ideas, in the instant case the state has sought to widen the range of students' access to a broader set of ideas and information. In opposition, a group of citizens has sought to have removed from the curriculum the presentation of ideas with which they personally disagree. Relying on the right of access to ideas and the broad power of the state to control the public school curriculum, the federal courts have generally rejected such efforts by private citizens' groups to censor the public school curriculum to conform to their particular viewpoints. *See, e.g., Grove v. Mead School District No. 354*, 753 F.2d 1528, 1533 (9th Cir.), *cert. denied*, 106 S.Ct. 85 (1985).

Furthermore, in this case the right of increased access to ideas is coupled with, rather than opposed to, the broad power of state and local authorities to prescribe the curriculum of the public schools. *Cf., Pico*, 457 U.S. at 863-64 (plurality opinion). Indeed, it would be odd for the state to have the power, albeit a very limited one, to require privately owned media to provide equal treatment of certain opposing views, and yet not have the authority to require balanced treatment of certain ideas in its public school curriculum. *Cf., Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969).

Thus, this case presents an interesting twist in the line of cases involving protection of the dissemination and discussion of ideas. The Balanced Treatment Act is an "effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge

public discussion." *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) (per curiam). A powerful group of citizens has challenged the law in an effort to have the federal courts block access to information in the public schools that a state believes its future citizens should have. Unlike the majority of cases in which citizens challenge state laws that restrict the free flow of information, the discomfiting feature of this case is the attempt of one group of private persons to restrict the free flow of information to other persons.

It is this critical twist that makes this case the constitutional inverse of *Epperson v. Arkansas*, 393 U.S. 97 (1968). In *Epperson*, the state passed a law restricting the access of its future citizens to a set of ideas regarding the origins of man. Like the supporters of the laws under consideration in *Epperson* and *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927), the opponents of the Balanced Treatment Act seek to limit access to ideas in the science classroom regarding the origins of man. They want one set of ideas—and no others—taught as orthodoxy in the public school science curriculum. Such viewpoint discrimination in itself implicates First Amendment values. *Tinker*, 393 U.S. at 511; *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983). As in *Epperson*, this effort to suppress ideas should be rebuffed. The Constitution does not mandate that a particular set of ideas regarding the origins of the universe be given a monopoly in the public school curriculum.

IV. THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE THAT FACTUAL INFORMATION BE SUPPRESSED.

A. The Secular Purpose.

The court of appeals and the district court held the Balanced Treatment Act unconstitutional, ruling that it violated the secular purpose prong of the Establishment

Clause tripartite test. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). However, neither court properly applied the secular purpose test but instead relied on "visceral knowledge regarding what must have motivated the legislators", disregarding "completely the existing manifestations of intent" and instead imposing their "personal, subjective ideas" as to the true motive of the Louisiana legislature. *Aguillard v. Edwards*, 778 F.2d 225 (5th Cir. 1985) (Gee, J., dissenting from denial of rehearing en banc). Neither court made factual findings based upon the legislative history to support its holding that the legislation had an unconstitutionally religious purpose. Although the Fifth Circuit had this Court's decision in *Wallace v. Jaffree*, 105 S.Ct. 2479 (1985), to guide its reasoning, it ignored the principles set forth in that opinion and instead relied on a superficial and entirely unsatisfactory analysis that failed to support its conclusion.

As this Court stated in *Jaffree*, a statute is unconstitutional if it is "entirely motivated by a purpose to advance religion". *Id.* at 2490; *id.* at 2494 (Powell, J., concurring). In *Jaffree*, the legislative record affirmatively showed that a desire to return voluntary prayer to the public school classrooms was the sole motivation for the statute. Indeed, at trial, the primary legislative sponsor testified that this was his sole motivation. Furthermore, at trial, the state did not present evidence of any secular purpose. *Id.* at 2490-91; *id.* at 2494 (Powell, J., concurring). Finally, a permissible purpose of the statute was served by a statute already in effect.

A "statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief 'was and is the law's reason for existence'." Jaffree, 105 S.Ct. at 2500 (O'Connor, J., concurring). The Balanced Treatment Act in its text cites a very plausible reason, protecting academic freedom, for requiring balanced treatment of two scientific

viewpoints in the public schools. It can hardly be argued that the purpose of the statute is to endorse a religious viewpoint, when the text of the statute requires balanced treatment of two scientific theories taught as science.

In contrast to the statute in *Jaffree*, the Balanced Treatment Act states that its purpose is to protect academic freedom. La. Rev. Stat. § 17:286.2. Note that the statute does not prescribe *any* time be spent on presentation of origins. Most importantly, it leaves the determination of whether to discuss the topic of origins as well as the determination of what constitutes balanced treatment to the judgment of the classroom teacher, who determines the information and instruction "necessary and appropriate to provide insight into both theories". La. Rev. Stat. § 17:286.3(1). The legislative record supports the fact that academic freedom, the concern that students in the public schools in Louisiana be receiving a balanced view of an important topic of education, was certainly a secular purpose motivating the statute.

Thus, the statute requires that a certain area of scientific facts be presented to students but leaves the bulk of the responsibility for determining how to carry this out in the hands of the classroom teacher. Contrary to the Fifth Circuit's mischaracterization of academic freedom as the exercise by classroom teachers of unlimited discretion, the state sets the general framework for the curriculum in public education and then allow the teachers to determine how best to teach the general topics it has required.[16] Thus, the purpose and effect of this stat-

---

[16] Section 286.4C of the statute prohibits discrimination against a teacher "who chooses to be a creation-scientist or to teach scientific data which points to creationism . . .". This provision has been questioned because it does not mention teachers who are evolutionists or who teach data to support evolution; however, this section would be consistent with a purpose to protect academic free-

ute encourages the balanced dissemination of information to students.

In reaching its holding, the panel below relied on two premises, neither of which adequately supports its holding. First, the panel below made much of "the historical fact that the controversy between the proponents of evolution and creationism has religious overtones." *Edwards*, 765 F.2d at 1256. That is true, but not determinative. Many controversies in our society have had religious overtones, yet that does not mean that ideas on all sides of the controversy could not be discussed. *See, e.g., McDaniel v. Paty*, 435 U.S. 618 (1978). The history of this particular controversy merely shows that the extremists on both sides of the controversy have been willing to use the law, either through the legislatures or the courts, to try to eliminate from public consideration the other side's point of view. Neither side should be allowed a monopoly of viewpoint in the public school curriculum.

The second premise of the opinion below is an offensive, if not dangerous, one. The panel below assumed that any idea that corresponds to beliefs of some or many religions may not be discussed in the public schools "irrespective of whether it is fully supported by scientific evidence". *Edwards*, 765 F.2d at 1253.[17] At times in the past, some scientific evidence could not be taught unless it supported religious beliefs; today, the court below suggests that one cannot teach scientific evidence if it sup-

---

dom, if legislators believed that teachers who teach scientific data supporting creation-science run a greater risk of discrimination within the educational establishment.

[17] Another way the court below frames this is by saying that "the theory of creation is a religious belief". *Edwards*, 765 F.2d at 1256. However, creation is not the exclusive domain of religion, but increasingly is considered a possibility by persons espousing various theories of evolution. Furthermore, the lower court itself admits there are probably some people to whom the theory of creation is not solely and exclusively a religious tenet.

ports a religious belief. Both views are repugnant to normal scientific inquiry.

As this Court has held, it does not follow that a statute violates the Establishment Clause because "[It] happens to coincide or harmonize with the tenets of some or all religions". *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). The issue is not whether religious doctrine can be taught, for it cannot be. The issue is whether facts can be taught in a public school curriculum even if students may derive from those facts implications that may be consistent with a religious belief.

Of course, ideas that parallel religious ideas are often taught in the public schools. *See, e.g., School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963). Thus, monogamy can be taught to be the preferred form of marriage in sex education or home economics classes, even though that teaching corresponds directly to religious teachings. Similarly, the public schools can teach students that it is wrong to steal, regardless of the fact that that is also the Eighth Commandment. *Jaffree*, 105 S.Ct. at 2497 (O'Connor, J., concurring); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam). Certainly in the civics classroom students should be taught "all men are created equal", even though the Declaration of Independence makes clear at its opening and concluding paragraphs that this central tenet directly relies on a belief in a Creator. It would be logically inconsistent to allow the scientific concept of creation to be discussed in the civics classroom while simultaneously forbidding its discussion in the science classroom.[18]

---

[18] The opponents make much of the fact that the state has not cited to any curricular materials that could be used to teach creation-science. Since the textbook market, like any other, responds to demand, this is not surprising since previous demand for such materials has not existed. However, the material cited in the states' brief as well as materials cited in this brief, demonstrate

Oddly, the panel below said the Act was unconstitutional because its "intended effect [was] to discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism, a religious belief". *Edwards*, 765 F.2d at 1257. The panel forgot that it is not the role of the government, including the courts, to protect any ideas from being discredited. If evolution can be discredited merely by students being allowed to hear true scientific facts, then it deserves to be discredited. As the dissent to the denial of rehearing in the court below observed, Clarence Darrow believed that truth was truth and could always be taught whether it favored religion or not. *Edwards*, 778 F.2d at 226. The First Amendment protects the free flow of ideas; it does not protect the ideas themselves from being discredited. *See Buckley*, 424 U.S. at 48-49. ("The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.") *See also, Linmark Associates, Inc.*, 431 U.S. at 93-94.

As this Court has cautioned, reviewing the motivation of a statute, for purposes of holding the statute unconstitutional, is a serious and weighty function of the judiciary. The scope of the secular purpose inquiry should be deferential and limited. *Jaffree*, 105 S.Ct. at 2500 (O'Connor, J., concurring). The courts should generally defer to the stated intent of the statute, "[if] the legislature expresses a plausible secular purpose . . . in either the text or the legislative history. . . ." *Id.* It is extremely disturbing that the courts below should strike down a state statute without making specific factual findings to support the holding.[19] In the strong words of the dissent-

---

that there is factual scientific evidence to support a discussion of creation without any resort to religious doctrine.

[19] Although when both courts below are unable to discern an arguably valid secular purpose, the Supreme Court normally should hesitate to find one, *Jaffree*, 105 S.Ct. at 2495 (Powell, J., concur-

ing judges on the Fifth Circuit, who found "a credible secular purpose": "This approach effectually makes a farce of the judicial exercise of discerning legislative intent." *Edwards*, 778 F.2d at 227.

B. Primary Effect.

The primary effect of the Balanced Treatment Act is "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion." *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976) (per curiam). As has already been discussed, the primary effect of the Balanced Treatment Act is to require that students receive a balanced presentation of two models of science regarding the origins of the universe, if a teacher chooses to teach any model of the origins of the universe. If the teacher has in the past exclusively taught scientific evidence to support evolution, that teacher must now balance that teaching with teaching scientific facts supporting creation-science. If a teacher has been teaching exclusively creation-science, that teacher must now balance his or her teaching with a presentation of the scientific facts supporting evolution. The judgment as to what constitutes balanced treatment is left in the hands of the classroom teacher.

Since the statute requires only that scientific evidences be taught that support both theories, the opponents' assertion that the effect of this statute will be to bring religious doctrine into the classrom is, at best, an incorrect exaggeration. The statute in no way sanctions religious indoctrination or religious devotional activities in the classroom. It merely sanctions providing students with factual *scientific* material. The district court admitted that "a public school curriculum could give bal-

---

ring), in this case, the courts did not make the necessary good faith effort to discern an arguably valid secular purpose of the statute. Because of the paucity of supporting material or rationale in the courts' opinions, their conclusion that the motivation for the statute was solely religious should not be accepted.

anced treatment to evolution and creationism without advocating the latter". *Aguillard v. Treen*, No. 81-4787, slip op. at 10 (E.D. La. Jan. 10, 1985). Although it perfunctorily concluded that balanced treatment would not occur under this statute, it gave absolutely no support for its unwarranted conclusion that the statute went beyond "mere objective exposure of the creationism concept as part of a secular program designed to educate students concerning various theories of the origin of man and the universe". *Id.* at 11.

C. Excessive Entanglement.

The excessive entanglement arguments that the opponents of the Act make are specious, since they are issues that have been dealt with successfully in analogous contexts in the public schools. Indeed, most of the entanglement concerns raised by the opponents exist when evolution is the sole model being taught.

The opponents argue that school officials will have to separate secular elements of creation-science from religious ones in their development of a curriculum and presentation of scientific material supporting the creation-science model. However, since the statute requires only the teaching of scientific evidence, there is no need to sift through religious doctrine or ideas in order to comply with the Act.

The opponents then postulate that any curriculum developed will have to be screened and monitored continuously to prevent religious instruction, and that teachers will be unable to avoid religious questions in the classroom. These issues are equally present in the classroom that discusses only evidence for evolution.

These concerns have been more than successfully met in developing and implementing public school curricula regarding not only evolution but also other topics, such as comparative religion, history, literature, philosophy, music, art, and psychology, all of which sometimes touch on religious values and issues. The law assumes a teacher

can be neutral in a public school curricular setting, including teaching about religion rather than teaching religion an an article of faith. *See e.g., School District of Abington Township v. Schempp*, 374 U.S. at 225 (teaching religion objectively); *Board of Education v. Allen*, 392 U.S. 236 (1968) (textbooks to be used in religious schools can be screened to insure that they are secular).

The law requires that a teacher be neutral in responding to classroom questions regarding religious issues. If religious questions were raised by the students in the science classroom, it would not be the first time for any science classroom that has dealt with the origins of man through evolution, let alone classrooms that deal with comparative religion, history, literature, philosophy, music, art, or psychology. In the words of this Court, "[it] can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state". *Wolman v. Walter*, 433 U.S. 229, 248 (1977). The cases cited by the opponents all involve the supervision and monitoring problems that are present when public school teachers enter private religious school classrooms or where private school teachers are government subsidized—the salient features of the programs struck down by this Court on entanglement grounds. *Aguilar v. Felton*, No. 84-237 (July 1, 1985), slip op. 10; *id.* at 2 (Powell, J., concurring); *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

Thus, this statute raises no issues of excessive entanglement that have not already been successfully dealt with in the public school curriculum. Indeed, the exclusive teaching of evolution raises the same entanglement issues.

This case provides the Court with an opportunity to affirm the balanced treatment given by statute to two scientific views. It will thereby further the interest of academic freedom and the First Amendment and assure

that scientific views, however unpopular, will not be subject to judicial censure without trial.

CONCLUSION

The judgment of the court of appeals should be reversed and judgment entered in favor of appellants, or, in the alternative, the case should be remanded to the district court for trial.

Respectfully submitted,

Of Counsel:
FOREST D. MONTGOMERY
NATIONAL ASSOCIATION OF EVANGELICALS
1430 K Street, N.W.
Washington, D.C. 20005
(202) 628-7911

MICHAEL J. WOODRUFF
Counsel of Record
KIMBERLEE W. COLBY
SAMUEL E. ERICSSON
CHRISTIAN LEGAL SOCIETY
P.O. Box 1492
Merrifield, VA 22116
(703) 560-7314

June 19, 1986